

**Social Clauses in Public Sector Procurement
Consultation Questionnaire with Industry Bodies**

Chambers Ireland Response



Questionnaire

1. General views

Have you/ your members any familiarity, knowledge or experience of the use of Social Clauses when bidding for public sector business previously?

- a. If Yes; please give details and highlight any general positive and negative experiences you think OGP should be aware of.
- b. If No; please outline any general views or concerns you have (if any) regarding their use in Government contracts and framework agreements.

We are aware of some of the results of initiatives to include social clauses in procurement in other jurisdictions. Some of the benefits of employment based clauses were high employee retention rates within companies.

However, Chambers Ireland is concerned that the introduction of social clauses in public contracts could act as a barrier to some business, in particular, smaller businesses accessing public procurement. Specifically relating to social clauses based on supporting employment, there can be significant costs in organisational time spent searching for unemployed workers and the administration that follows in order to maintain compliance with the regulations from the social clauses. One issue raised by contractors in previous projects was that of trying to identify unemployed persons to fill positions that required specific skills.

2. Sector/ category perspective

Please state if there are there any particular categories of goods/ services or sectors of the economy where you believe the use of Social Clauses should be targeted or avoided. The list that follows (16 main Government spend categories) may be helpful in framing your responses, but please feel free to use your own terminology.

Main Categories of Government Procurement

- Professional Services
- Facilities Management and Maintenance
- Utilities
- ICT and Office Equipment
- Marketing, Print and Stationery
- Travel and HR Services
- Fleet and Plant
- Managed Services
- Minor Building Works and Civils
- Plant Hire
- Medical Professional Services
- Medical and Diagnostic Equipment and Supplies
- Medical, Surgical and Pharmaceutical Supplies
- Defence and Security
- Veterinary and Agriculture
- Laboratory, Diagnostics and Equipment

a. Sectors, industry areas and/or categories to **target** as suitable for Social Clauses; please list, as appropriate.

- Facilities Management and Maintenance
- Minor Building Works and Civils

b. Sectors, industry areas and/or categories to **avoid** as not suitable for Social Clauses; please list, as appropriate.

3. Focus area of Social Clauses

The table below summarises six objectives under consideration for Social Clauses. Some or all of these may be appropriate depending upon the circumstances.

Please rank them in the context of how you/ your members typically view their desirability (benefit to society) and deliverability (ease of implementation).

Note 1 please feel free to rank all equally if forced ranking not appropriate.

Note 2 please add any additional focus area you feel is important and not covered here (row 7)

Objectives	Desirability 1 = Most Desirable 6 = Least Desirable	Deliverability 1 = Easy to Deliver/Implement 6 = Difficult to Deliver/Implement	Commentary
1. Employment of the long term unemployed.	1	4	
2. Employment of persons with disabilities.	2	6	
3. New apprenticeships for new recruits.	4	3	
4. Maintaining of existing apprenticeships.	3	3	
5. Work experience opportunities incorporating a learning & development element (with training).	5	5	
6. Work experience opportunities (with no training).	6	4	
7. Other (Please add)			

4. Requests for Tenders (RFTs) and Evaluation of Tenders

If Social Clauses are used in RFTs they can be used as part of the mandatory qualification criteria or the evaluation criteria or potentially both.

Mandatory Qualification Approach

If part of the **mandatory qualification criteria** in order to be considered all bidders must comply with a minimum requirement e.g. bidder commitment to employ at least %+ persons from Long Term Unemployed, if successful. Any bidder not making this commitment would not proceed to the evaluation stage. This would mean that all bidders would have to make a minimum commitment, but they would **not** be scored any marks, if committing to employ more long term unemployed persons over and above the minimum required level of %+ (binary approach)

a. Please provide commentary or opinion on this Mandatory Qualification approach

This approach is not desirable as it automatically excludes a number of companies from the procurement process. This would be particularly harmful to smaller businesses that may have small staff numbers and cannot hire those in long term unemployment without displacing current staff.

Scored Evaluation Criteria Approach

If part of the **evaluation criteria** a set number of marks or % score, up to a maximum e.g. 3% of total marks is awarded for this section of a bidder's tender. The section is not a qualification/mandatory criteria bidders can choose not to make any %social+commitment and their bids will proceed to evaluation, but they will lose the proportion of marks set aside for this. In this case for example their bids would attract up to a maximum of 97% of the marks and not 100%.

b. Please provide commentary or opinion on this Scored Evaluation Criteria approach

This would be a more desirable approach as it rewards companies with social clauses and encourages other companies to implement them with excluding any companies outright.

c. Please make any suggestions for alternative approaches to evaluation of the Social Clauses elements of an RFT.

In some jurisdictions social clauses are only used in event of a tie-breaker i.e. when competing bids have the same scores under all other criteria, social clauses are used to determine the winning bid.

- d. Please provide your views as to the minimum / maximum overall tender scoring % marks that should be available for evaluation of a social clause. (e.g. 3% is used in the example above)

The marks available for social clauses should be a small percentage (perhaps no more than 5%) to ensure that the contract is awarded primarily on ability to deliver and that it does not act as a barrier to some businesses, particularly SMEs, competing for contracts.

5. Ongoing reporting by suppliers on adherence to Social Clause

- a. Please outline any concerns and / or suggestions you may have regarding how this compliance could/ should be measured.

While it is clear that there must be some level of scrutiny of social clauses, it is vital that this process does not become too onerous. Tendering and fulfilling public contracts already involves a high level of compliance and paperwork and it is important not to add to this burden. A quarterly report is the most desirable option but should be a simple one page form where suppliers can confirm that they are still compliant with the conditions of the contract.

- b. Please make suggestions as to how the costs of this ongoing monitoring can be kept to a minimum to avoid adding overhead to successful Tenderers.

The evaluation process should be conducted via an online system. This could be incorporated into the current eTenders website. A simple online form that businesses can quickly complete and the OGP can easily access is the best way to approach this. It can be set up to send automatic reminders to companies when their report is due.

Interaction between OGP and DSP could also facilitate the transfer of information necessary to ensure social clauses on employment are being met.

6. Addressing challenging issues and avoiding unintended consequences

- a. Tenderers operating with minimum profits and little (if any) cash to invest in new employment commitments (current staff may be underemployed), and the tenderer may not be in a position to comply with a social clause.

If a tenderer needs more staff to complete a contract but cannot afford to hire them that would suggest that they are not capable of fulfilling the contract and it should be awarded to a more suitable tenderer. If an increase in staff numbers is not required to fulfil the contract then this should be taken into account. It is important that any social clauses, particularly those relating to employment, do not have a negative effect on or displace existing staff.

- b. Social Clauses compliance can be easier and less costly for larger organisations to achieve than SMEs given their infrastructure, thus potentially reducing competition.

This is the single greatest issue that threatens the successful implementation of social clauses in public contracts. It is vital that social clauses are realistic and achievable by a business of any size. For example, it might be hard for an SME with a small number of staff to provide work experience opportunities or reach a high number of employees for those in long term unemployment or with disabilities.

- c. Social Clause focus is on new initiatives, recognition may not be given to Tenderers who already employ higher than average number of people with disabilities/ or people recently recruited from long term unemployed or organisations with explicit ongoing social objectives.

There is no reason for social clauses to focus solely on new initiatives. It is unacceptable to discriminate against those who have already implemented social values and initiatives throughout their business in favour of those planning to do so in the future. This can be easily be tackled by the wording of the social clauses. For those businesses who already have socially valuable initiatives in their business, the criteria for them could be to commit to maintaining their initiatives for the duration of the contract.

- d. Bidders may make promises / commitments in tenders and may not follow through when contract is awarded. This could be due to difficulty in finding and recruiting suitable candidates in the employment market or for other reasons.

This is an issue which is likely to come up often and must be taken into account. It is quite possible that while a tenderer makes a commitment to hire X number of those in long term unemployment, there are not enough suitable candidates with the required skill set to meet these criteria. In this case, there should be a process in place whereby the tenderer can prove that they have undertaken all reasonable attempts to meet the criteria and outline why it was not possible to do so. Issues of this nature will be important for the evaluation of the success of social clauses in public contracts and allow the OGP to review whether certain social clauses are attainable or need to be reviewed.

- e. Displacement, whereby tenderers may dismiss current staff in order to recruit staff which meet social objectives e.g. long term unemployed or persons with disabilities, or indeed dismiss current staff and reemploy if contract is won.

There could be an analysis of the average ratio of full-time to part-time employees in the companies that make it to a short listing stage to ensure that they maintain appropriate staffing levels and do not simply hire increased numbers of employees with a view to meeting social clause requirements.

7. Any further observations or comments

It is commendable the OGP is looking to harness the public procurement process to support job creation and provide social value. While the use of social clauses can be beneficial to the economy and community, there are a number of pitfalls to be avoided.

It is vital that the introduction of social clauses in public contracts does not become too onerous that it deters businesses from tendering. The OGP has made a number of commitments in recent months to support and encourage the inclusion of SMEs in the public procurement process. If the implementation of social clauses is not done correctly it could act as yet another barrier to SMEs. The OGP must ensure that criteria for meeting social clauses are attainable by all businesses and that it doesn't provide a greater advantage to large businesses.

The majority of examples of social clauses in this consultation paper have revolved around employment. While this is to be welcomed, it must not result in the displacement of existing staff and safeguards must be put in place to ensure this does not happen.

The OGP should have a clear plan as to what social issues these clauses are attempting to address and put in place an evaluation system to monitor its impact on an ongoing basis. It should be reviewed annually and modified depending on its success.

Most importantly, the introduction of social clauses must be done in collaboration with the business community. The OGP should seek feedback from the wider business community and take this on board before implementation. Prior to implementation, there must be an awareness campaign amongst businesses so that they are prepared to meet the criteria of new contracts. Those responsible for the awarding of public contracts must be fully trained on how to evaluate social clauses.